In the Supreme Court of the United States.

OCTOBER TERM, 1920.

WILLIS D. WILLIAMS AND AZEL WILLIAMS, plaintiffs in error,
v.
THE UNITED STATES OF AMERICA, defendant in error.
} No. 159.

BRIEF FOR THE UNITED STATES.

This case is here on writ of error to the United States District Court for the District of Indiana to review a conviction of plaintiffs in error upon an indictment for violation of the Reed amendment.

STATEMENT OF THE CASE.

The Federal grand jury for the district of Indiana on February 17, 1919, returned an indictment against Willis D. Williams, Azel Williams, and Harry Hudson. (R. 1–5.)

The first count of the indictment charges that—

> Willis D. Williams, Azel Williams, and Harry Hudson, late of said district, at the district aforesaid, on the twentieth day of September, in the year of our Lord one thousand nine hundred and eighteen, did then and there unlawfully cause certain intoxicating liquor, to

> wit, one hundred and five gallons of whisky, to be transported in interstate commerce from Cincinnati, in the State of Ohio, into the State of Indiana, the laws of which latter State then and there prohibited the manufacture or sale therein of intoxicating liquors for beverage purposes, and said intoxicating liquors not being so transported for scientific, sacramental, medicinal, or mechanical purposes, * * *. (R. 1.)

The second count charges, in substantially the same language, the transportation, on September 23, 1918, of 135 gallons of whisky from the State of Ohio into the State of Indiana. (R. 2.)

The third count charges the similar transportation, on September 26, 1918, of 135 gallons of whisky. (R. 2.)

The fourth count, which charged a conspiracy on the part of defendants to violate the Reed amendment and enumerated 27 overt acts, was dismissed.

The defendants, Willis D. Williams and Azel Williams, filed demurrers to the indictment, which demurrers were overruled and they proceeded to trial upon a plea of not guilty. The defendant Harry Hudson entered a plea of guilty and testified as a witness for the Government in the case.

TESTIMONY.

The testimony given at the trial is substantially as set forth in the brief of plaintiffs in error and need not therefore be set forth herein.

THE LAW.

Chapter 162, paragraph 5, of the act of March 3, 1917 (39 Stat. 1069), under which this prosecution was had, is known as the Reed amendment, and provides, in part, as follows:

> Whoever shall order, purchase, or cause intoxicating liquors to be transported in interstate commerce, except for scientific, sacramental, medicinal, and mechanical purposes, into any State or Territory the laws of which State or Territory prohibit the manufacture or sale therein of intoxicating liquors for beverage purposes, shall be punished as aforesaid: *Provided*, That nothing herein shall authorize the shipment of liquor into any State contrary to the laws of such State. * * *

ARGUMENT.

Plaintiffs in error rely upon 10 alleged errors. In the first two assignments of error it is contended that the Reed amendment is unconstitutional. This contention has been fully met in defendant's motion to dismiss or affirm, and need not be further dwelt upon here.

The third point urged by plaintiffs in error is that the indictment is defective because though following the language of the statute it charges that the defendants "caused intoxicating liquors to be transported in interstate commerce," and that transportation itself not being made unlawful by the statute, therefore the causing to be transported is not an offense.

We take issue with counsel for the plaintiffs in error, and submit that the transportation of intoxi-

cating liquor in interstate commerce into a dry State is illegal, and that one who himself so transports it violates the provisions of the Reed amendment. In the case of *United States* v. *Hill* (248 U. S. 420) the court said, at page 424:

> In the passage of the Reed amendment it was intended to take another step in legislation under the authority of the commerce clause. The meaning of the act must be found in the language in which it is expressed when, as here, there is no ambiguity in the terms of the law. The order, purchase, or transportation in interstate commerce, save for certain excepted purposes, is forbidden.

It is absurd to say that one who himself transports does not "cause to be transported," and in the light of section 332 of the Penal Code equally unreasonable to say that one who causes another to transport is not a principal. In the Hill case itself the defendant was charged with causing to be transported by taking liquor into his possession and traveling on a street car from one State into another the laws of which prohibited the sale and manufacture for beverage purposes.

The verb "cause" is defined in the New Standard Dictionary as follows: "To be the cause or occasion of; produce; effect; bring to pass." It is clear that one who himself transports "effects" transportation and "brings it to pass," just as much as he does when he procures some one else to transport it. The offense defined in the statute is the offense of causing

liquor to be transported, not alone the offense of causing another to transport it.

In the fourth point of counsel's argument it is suggested that the indictment was defective because of a misjoinder of misdemeanors in the first three counts with a felony in the fourth. If this ever constituted a defect, which in view of the provisions of section 1024, Revised Statutes, we think it did not, it was disposed of by the dismissal of the felony count.

In point 5 it is argued that the indictment is indefinite in that it charges that the laws of Indiana prohibit the "manufacture or sale" of intoxicating liquors, the plaintiffs in error contending that where the disjunctive "or" is used in the statute the definiteness required in criminal pleading necessitates that such terms should be joined by the conjunctive "and." There seems to be no great force to this argument of the plaintiffs in error, as it is very evident that Congress intended by the Reed amendment to prohibit the transportation of intoxicating liquor into States prohibiting either the manufacture or sale of liquor within their borders. It is submitted that the well-established rule, stated in 22 Cyc. 336 and supported by numerous authorities, that either the letter or the substance of the statute must be followed, would apply in this case. The indictment in this case followed the wording of the Reed amendment and definitely described the offense charged.

The sixth point relied on by plaintiffs in error is that the indictment is insufficient in that it fails

to charge whom it was that he caused to transport liquor in interstate commerce. Since, as has already been suggested, "causing to be transported" includes transportation and one who himself transports is guilty of causing to be transported, it does not follow from the language of the indictment that it charged or was intended to charge that defendants secured a fourth person to transport the liquor in question. It charges that the three defendants *caused certain intoxicating liquor* to be transported in interstate commerce.

This case is distinguishable from the case of *United States* v. *Simmons* (96 U. S. 360), relied on by plaintiffs in error. There the indictment was framed under section 3266, Revised Statutes, which provides that "No person shall use any still, boiler, or other vessel for the purpose of distilling, in any dwelling house, etc., * * * and every person who does any of the acts prohibited by this section, or aids or assists therein, or causes or procures the same to be done," shall be punished as provided. It appears from this language that one who causes or procures the prohibited acts to be done causes or procures another to do them, a conclusion which is not to be drawn from the use of "cause" in charging an offense under the Reed amendment.

It is also to be noted that the decision in *United States* v. *Simmons* was made prior to the enactment of section 332 of the United States Penal Code, which provides that whoever aids, abets, counsels, commands, induces, or procures the commission of an

offense is a principal. Since the enactment of this section one who procures an offense to be committed may be charged directly with the commission of the offense which he procures to be committed. This distinction was apparently in the mind of Mr. Justice Harlan when he said, in the Simmons case:

> Since the defendant was not charged with using the still, boiler, and other vessels himself, but only procuring some one to use them, the name of that person should have been given.

In the instant case the defendants were not charged with procuring some one else to do the prohibited acts; they were all charged as principals in the language of the statute. The propriety of such pleading is fully discussed in *Rosencranz* v. *United States* (155 Fed. 38), in which the Circuit Court of Appeals for the Ninth Circuit held that under the Alaska Penal Code, which abolished the old distinctions between principal and accessory before the fact, one who aids and abets another in the commission of a crime may be charged in the indictment and convicted as a principal, saying:

> Our conclusion is that where a statute has done away with former distinctions between principal and accessory before the fact, as it has in Alaska, a charge against one formerly known as an accessory is good against him as principal, and that he must answer to the proofs whether they disclose that he was present and did the overt act, or, not being present, aided and abetted the doing of it in a way to make himself liable as a principal.

In *State* v. *Steeves* (29 Ore. 85, 43 Pac. 947) Steeves was indicted for murder. At the trial the proof showed that at the time of the murder he was not present, but that he counseled and procured one Kelly to kill the deceased. His attorneys contended that the indictment did not charge Steeves with the offense for which he had been tried, and that he should have been charged as accessory before the fact, and that to charge him as a principal violated the provision of the Constitution, which guarantees to the accused the right to demand the nature and cause of the accusation against him. The court said that under the laws of Oregon (sec. 204, Hill's Ann. Laws of Oregon) all persons concerned in the commission of a crime were treated as principals and should be indicted, tried, and punished as principals.

Also see:

Vane v. *United States*, 254 Fed. 32.
Kelly v. *United States*, 258 Fed. 392, 402.
Rooney v. *United States*, 203 Fed. 928, 932.

In points 7 and 8 plaintiffs in error assign as error the refusal of the trial court to charge that the word "cause" was the proximate cause, and also his failure to charge that it was not the duty of plaintiffs in error to take positive steps to prevent Harry Hudson from violating the law. Under the argument above as to the meaning of the word "cause" and what really constitutes the offense under the Reed amendment, it is not thought necessary to further comment upon these points.

In the ninth point of argument it is contended that the trial court erred in refusing to instruct the jury to return a verdict of acquittal on the ground that the evidence was insufficient to sustain a verdict of guilty. It is admitted by counsel for plaintiffs in error that there was some evidence to sustain the the verdict of the jury, and the jury, who are judges of the facts, considered that evidence sufficient to warrant a verdict of guilty. It is well settled that this court will not review the evidence in the lower court for the purpose of ascertaining whether the verdict was in accordance with the preponderance of the evidence, and that this court will only review the record for the purpose of ascertaining whether or not there are errors of law. It is apparent that there was sufficient evidence to justify the court in submitting the case to the jury, who are judges of the credibility of the witness Hudson.

See:

Burton v. *United States*, 202 U. S. 244, 373.
Humes v. *United States*, 170 U. S. 210, 212.

In the latter case the court said:

> The alleged fact that the verdict was against the weight of evidence we are precluded from considering if there was any evidence proper to go to the jury in support of the verdict. (*Crumpton* v. *United States*, 138 U. S. 361; *Moore* v. *United States*, 150 U. S. 57, 61.)

It is submitted that there was no error on the part of the court below in allowing this case to go to the jury. The uncontradicted testimony of Harry Hud-

son, if believed by the jury, was ample to establish the guilt of the defendants. This evidence was corroborated in certain minor details by other witnesses. It was not contradicted and no attempt was made to impeach the witness. The jury had before it all the witnesses and, being the judges of the facts, was in a position to judge of and pass upon the credibility of each witness.

The tenth point is based upon the refusal of the trial court to grant the request of defendants for a directed verdict, which request was based upon the grounds that the prosecution had failed to prove the allegation in the indictment that the intoxicating liquors mentioned therein were not caused to be transported for scientific, sacramental, medicinal, or mechanical purposes, the exceptions made in the Reed amendment. In the absence of a denial of these allegations there was ample evidence from which the jury was justified in drawing the inference that the transportation in question was not for any of the excepted purposes. The clandestine manner in which the transactions were carried on was sufficient to justify such inference, and verdicts may rest upon rightful inference as well as upon direct testimony.

In *Robilio* v. *United States* (259 Fed. 101) the Circuit Court of Appeals of the Sixth Circuit said per curiam in a similar case:

> Aside from any "confession" there was sufficient evidence from which the jury might find that the offense had been committed as well as that the liquor was not for one of the

> excepted purposes. Verdicts may rest upon rightful inference as well as upon direct testimony. (Citing *Laughter* v. *United States*, 259 Fed. 94, 101.)

There is likewise, in the absence of evidence that the transportation was legal, a presumption that it was illegal. This principle was expressed in the case of *Northern Pacific Railway Co.* v. *Lewis* (162 U. S. 366, 375), where it was contended that in the absence of evidence to the contrary it would be presumed that plaintiffs complied with the provisions of the timber acts, and that the cutting of timber in question was legal, but this court said:

> The right to cut is exceptional and quite narrow, and for specified purposes only. The broad general rule is against the right. If the plaintiffs had acquired the right by reason of a compliance with the provisions of the statute, the facts should have been shown by them. The presumption in the absence of evidence is that the cutting is illegal. (*United States* v. *Cook*, 19 Wall. 591.)

We submit that the judgment of the lower court should be affirmed.

Respectfully,

ANNETTE ABBOTT ADAMS.
Assistant Attorney General.

JANUARY, 1921.

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